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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

RICHARD WILMER GRUBER,

Defendant and Appellant.

F047525

(Super. Ct. No. VCF131854B)

OPINION

APPEAL from a judgment of the Superior Court of Tulare County. Winslow Christian, Judge. (Retired Associate Justice of the Court of Appeal, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.)

Tritt & Tritt and James F. Tritt for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, Louis M. Vasquez and Lewis A. Martinez, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted Richard Wilmer Gruber of six counts of procuring or offering a false or forged instrument for recordation in a public office (Penal Code, § 115, subd. (a)[1]

[1] All further statutory references are to the Penal Code unless otherwise noted.

(counts 6-11)), one count of conspiracy to defraud (§ 182, subd. (a)(4) (count 12)), and one count of conspiracy to use documents resembling process of the courts (§§ 182, subd. (a)(1), 526 (count 13)).[2] The trial court sentenced Gruber to the mid-term of two years on count 6, with concurrent two-year sentences on counts 7 through 11. The court imposed two-year mid-term sentences on counts 12 and 13, which it stayed pursuant to section 654.[3] The court revoked the UCC-1 financing statements that were the subject of this action, prohibited Gruber from filing documents without court permission, and prohibited Gruber from possessing a firearm.

On appeal, Gruber contends his convictions must be reversed because they are not supported by substantial evidence and reversal of the conspiracy convictions is required because the jury was not instructed on the elements of the target offenses. As we shall explain, we agree the conspiracy counts must be reversed based on the trial court's instructional error, but otherwise affirm the judgment.

FACTS

The May 1999 Incident

In May 1999, California Highway Patrol Officer Jean Edmonds stopped a white Suburban driven by Gruber's son, Dale Gruber, because the vehicle did not have any California registration or identifiable license plate. Dale Gruber could not produce a valid registration or proof of insurance. Gruber was in the vehicle and told his son he did

[2] The jury also convicted Gruber's co-defendant, Gordon Labelle, of five counts of procuring or offering a false or forged instrument for recordation in a public office (§ 115, subd. (a)) and two counts of conspiracy (§ 182, subds. (a)(1) & (4), § 526). Labelle is not a party to this appeal.

[3] The trial court initially sentenced Gruber to a three-year mid-term on count 6 and concurrent three-year sentences on counts 7 through 11. The court subsequently amended the judgment to impose a two-year mid-term on counts 6 through 11.

not have to provide identification. Officer Edmonds took Dale Gruber to jail while a tow truck was called.

The vehicle was towed by Crane's Towing, a business owned by Randy Bachhofer. The vehicle did not have a license plate. In the place where the license plate should have been was a white piece of paper that said "First House of Delegates, Tulare County, California." Gruber later came into Crane's Towing and asked for the vehicle. Rene O'Neal, who worked at the business, told him he would have to obtain a release from the police department. According to O'Neal, Gruber told her "that we would pay."

Sometime after this incident, Officer Edmonds was served at home with a subpoena to appear at a "so-called court" in Tulare County on threat of being sued for $1,000,000. Officer Edmonds drove by the address of the purported court, which was a house with a walnut field around it. Officer Edmonds took the subpoena to her office's legal department, which advised her to ignore the document as neither the court nor the document was valid.

O'Neal was also served with a summons to appear at a court. Not having heard of the court, O'Neal drove by its location and found what appeared to be a home having a yard sale.[4] She put the summons on Bachhofer's desk. Bachhofer took copies of the summons to his attorney, Richard Barron, who is a partner in the law firm Luke & Barron. Barron advised Bachhofer to disregard the papers because they were bogus documents. Two or three months after receiving the summons, Crane's Towing received another group of papers that included a "Notice and Demand," an "Order for Entry of Default" with the stamp of a "13th Judicial District" on it, and an "Abstract of Judgment" in the amount of $800,000.[5]

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[4] The home was the same one by which Officer Edmonds had driven.

[5] The "Notice and Demand," dated July 20, 1999, is addressed to "Van Beurden Insurance Services" and signed by Gruber. The notice states that "Van Beurden" is the agent for Bachhofer, an $800,000 judgment was entered against Bachhofer, and Gruber

The March 2000 Incident

On March 6, 2000, Visalia Police Officer Roy Dunn stopped Gruber because his vehicle had a homemade license plate. When Officer Dunn asked for a driver's license, registration and insurance, Gruber presented two handmade documents which he claimed were a vehicle registration and an authorization to operate a vehicle. Officer Dunn cited Gruber for driving without a valid license and failure to register the vehicle or have insurance. He also impounded the vehicle and called Crane's Towing. When Bachhofer pulled up, Gruber told Officer Dunn he already had some type of legal action against Crane's Towing from an earlier incident. After the vehicle was towed, Gruber appeared at Crane's Towing and demanded the return of his vehicle. O'Neal told Gruber he would have to obtain a release from the police station. Gruber responded there was no law and the vehicle had plates. O'Neal went to look at the plate and saw it was similar to the one on the vehicle that was towed in 1999.

After this incident, Officer Dunn received documents in the mail addressed to him at the Visalia Police Department. The documents stated they were filed on Gruber's

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"demands execution of said judgment to be paid to him within thirty days as set forth by the court order." The "Order for Entry of Default" contains a caption similar to one on a court pleading, which states "Richard Wilmer, Gruber [¶] against [¶] Randy Bachhofer[,]" and lists case number 990629-02. The order states the court finds Bachhofer was served with summons and had not appeared, therefore default was ordered to be entered on the record and "by the court[']s own motion that defendant is ordered to pay damages within thirty day[s] of the date of this order.… " The order is dated July 15, 1999, and signed by "Kenneth Richard [¶] Judge." The "Abstract of Judgment[,]" dated July 20, 1999, states the judgment creditor, Gruber, applies for an abstract of judgment and lists the judgment debtor as Bachhofer. Gruber signed the abstract, as did "Christopher James" as clerk, who certified that an $800,000 judgment was entered on July 15, 1999. These documents were mailed to Van Beurden Insurance Services in 1999. An insurance broker with Van Beurden faxed a copy of the documents to Bachhofer and asked what he wanted him to do with them. The insurance company did not pay the claim because Bachhofer's insurance only covered claims involving vehicles that are damaged while being towed.

behalf and that Dunn was being sued or had been found at fault in some civil action in the amount of $250,000 in gold dollars, lawful money, and $6,000,000 lawful money of the United States of North America. Officer Dunn turned the documents over to the city attorney, who determined they were not legal, official documents.

The Sale of Crane's Towing and Bachhofer's Lawsuit against Gruber and Labelle

Bachhofer decided to sell his business in 2000. By February 2003, he had entered into escrow with a buyer. On February 2, 2003, Gordon Labelle, Gruber's co-defendant, delivered papers to the escrow company and Bachhofer's office comprised of a UCC-1 financing statement, "Abstract of Judgment" showing an $800,000 judgment entered in case number 990629-02, a "Claim[,]" and a certificate of service signed by LaBelle. The UCC-1, which is numbered 0303160513 and has a file stamp of January 30, 2003, lists Bachhofer as the debtor, Gruber as the secured party, and "Judgment for $800,000.00 case #990629-2" as the collateral. The "Claim" is signed by Gruber and addressed to Bachhofer as "Customer." The document states "[i]t has come to [m]y attention that, by reason of Public Legal Notice, you are transferring certain private property to which a claim may be made under UCC. Therefore I make this claim. [¶] Description of claim: Judgment dated fifteenth day of the seventh month A.D. 1999 case #990629-02, [i]n the amount of 800,000.00 in lawful dollars of the United States of America."

Even though none of the papers was valid, Bachhofer was only able to complete the sale after a delay of several months and the expenditure of several thousand dollars in attorney fees. For over a year, Bachhofer had no access to most of the sale proceeds. The escrow company tried to get Gruber to sign a release of the lien, but he declined to do so. Eventually, Barron filed a lawsuit on Bachhofer's behalf against Gruber, Labelle,

Christopher James and Kenneth Richard that resulted in Bachhofer obtaining a judgment that declared the financing statement void.[6]

Sometime early in 2004, Barron became aware of two UCC filings against his firm, with Gruber and Labelle as creditors. Four other UCC filings showed Barron as the debtor and either Labelle or Gruber as creditors. Neither Barron nor his law firm owed any money to either person.

Barron's partner, Linda Luke, became aware of UCC financing statements filed against her and the law firm when an investigator showed them to Barron approximately six months before trial. Two of the financing statements showed Luke as being personally indebted to Gruber and Labelle, even though she in fact owed no such debts. Luke was not involved in the 2003 lawsuit Barron filed against Gruber and Labelle, other

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[6] Gruber has requested in his opening brief that we take judicial notice of the entire court file of Bachhofer's lawsuit against himself and Labelle, which was lodged as an exhibit in the trial court. Labelle's attorney objected to the introduction of the exhibit into evidence, to which the prosecutor responded he did not intend to introduce the entire file into evidence. Consequently, the exhibit was never received into evidence. Gruber contends the file is relevant because if we were to examine it we would discover that the judgment, which was obtained by default, is void because no proof of service was filed showing service of the complaint on Gruber. We note that Gruber appealed from the judgment in that case, and this court affirmed the judgment in *Bachhofer v. Gruber* (June 30, 2005, F045383) [nonpub. opn.].

Of course we may "take judicial notice" (Evid. Code, § 459, subd. (a)) of the "[r]ecords of … any court of this state" (*id.*, § 452, subd. (d)). We fail to see – and certainly, Gruber fails to show – the relevance of the subject record. Neither the court nor the jury made any determination in light thereof. Moreover, although the judgment was originally marked as an exhibit, it was not received into evidence. "Because … no evidence is admissible except relevant evidence, it is reasonable to hold that judicial notice, which is a substitute for formal proof of a matter by evidence, cannot be taken of any matter that is irrelevant.…" (12 Jefferson, Cal.Evidence Benchbook (2d ed. 1982) Judicial Notice, § 47.1, p. 1749.) (See *People v. Rowland* (1992) 4 Cal.4th 238, 268.) Consequently, we deny the request.

than the presence of the law firm's name on the pleadings. She never met Labelle or Gruber, and neither she nor her law firm were indebted to them.

LaRayne Cleek, the Tulare County court executive officer, jury commissioner and clerk, first learned of a UCC-1 naming her as the debtor and Labelle as the creditor in June 2003, when Cynthia Logan, the deputy court executive for the Tulare Superior Court, showed it to her. Cleek did not owe any money to Labelle, did not know Labelle, had never met him, and knew nothing of a lawsuit involving Labelle or Gruber. Cleek was not involved in the day-to-day running of the individual offices and would not have knowledge of individual proceedings. Cleek also would not know about particular papers filed in the clerk's office and would not be able to manipulate what happened there. Cleek's name is on the stamp for official papers and documents filed in the clerk's office. Normally a deputy clerk accepts and signs the documents. Clerks have nothing to do with determining the legality of documents filed and do not give legal advice. Clerks do not have the power to change a document that is filed; one who tried to do so would face disciplinary action.

Logan became aware of the lawsuit Bachhofer filed against Gruber and Labelle when some paperwork was dropped off at the clerk's office without any case number or other indication of the case to which it belonged. By looking at names, she determined to which case the paperwork belonged, but could not determine what the paperwork was intended to do, so it was simply stamped received and lodged in the file. Part of the paperwork included two documents that contained a copy of a summons published in a newspaper notifying Gruber and Labelle of Bachhofer's lawsuit against them, over which was handwritten in red ink nearly identical messages. One of the documents was signed by Gruber while the other was signed by Labelle. The documents stated "[y]our offer of contract for subject matter jurisdiction is hereby rejected and returned to you unsigned in full accord with truth in lending[,]" ordered them "to prove up the claim or cease and

desist[,]" that further correspondence must be signed under penalty of perjury, and "[i]f you or your agents/heirs/assigns are representing me … you are hereby fired!"

The Investigation

Craig McDonald, an investigator for the Tulare County District Attorney's Office, investigated Gruber because of the lien placed against Crane's Towing. McDonald spoke to Gruber at his home. Gruber told McDonald he was stopped for having an unregistered vehicle, even though his vehicle was registered because he had a "brand" on file with the state. Gruber said he went to the towing company to get the vehicle. When the company would not release the vehicle, he filed a lawsuit in the 13th Judicial District Court. Because Bachhofer, the company's owner, did not appear at the hearing, an $800,000 judgment was entered against him. Gruber did not justify the amount of the judgment. Gruber told McDonald he filed a UCC-1 against Bachhofer. Gruber refused to say whether he knew Labelle. Gruber explained that California's 1849 constitution was still valid since, although there was a second constitution in 1869, it did not state that any part of the prior constitution was invalid.

Eric Grant, an investigator with the Tulare County District Attorney's Office, contacted Labelle on July 19, 2004. Grant asked for Labelle's driver's license. Labelle refused to give him one, explaining if he signed a contract to get a driver's license, he would be in a franchise with the State of California. Labelle admitted having filed a UCC-1 against Cleek. Labelle told Grant that Cleek tried to get him to serve on jury duty even though he had a doctor's note and had helped Barron file some documents in the case against him. Labelle stated that if the information he had found out was shown in federal court, Cleek would be terminated, sent to jail and never hold office again. Labelle thought Cleek was manipulating court files by not giving documents over to the judges even though she had a duty to do so. Labelle had gone to the courthouse several times to look at his file, only to be told it was unavailable because it was on Cleek's desk. He had never actually talked to Cleek and did not know who she was.

Labelle published a copyright notice on his name in the *Thrifty Nickel* so that anyone who used his name would owe him $500,000 for each use. Labelle figured Cleek owed him $2,000,000 because the newspaper summons with his name was published four times. Labelle filed the UCC-1 financing statement because he called the UCC office and was told that was the way to secure a debt. Labelle explained Cleek's debt was based on the copyright violations and her being the person behind the lawsuit against him. If it was brought to his attention that there was a problem with the UCC filing or the law said he could not file a UCC, he would gladly apologize and remove the document. Labelle told Grant if anyone owed you money, you could file a UCC-1 to secure the debt and then send them a bill. Labelle said he hadn't bothered to bill Cleek, but he could if she wanted him to.

Labelle told Grant he had known Gruber for a long time and Gruber was a good, honest man. Labelle admitted delivering a number of documents for Gruber.

The Financing Statements

Kathleen Vasquez manages the Uniform Commercial Code Section of the business programs division of the Secretary of State's office in Sacramento, which handles the filing requirements for UCC-1 financing statements (UCC-1). Vasquez explained a financing statement is a simple document that lists a debtor and a secured party, and describes the collateral. The document serves as a notice that goes in the public record for interested third parties that a particular person has a debt secured by collateral that is not real estate. So long as a financing statement is filled out properly with the information contained in the Uniform Commercial Code, which includes the debtor and secured party fields, and the filing fee is paid, the Secretary of State is mandated to accept and file it.

There is no procedure for revoking or removing a UCC-1. The form stays filed over its life, typically five years, and Vasquez's office retains it for an additional year after that. A UCC-1 can be continued in a six-month window prior to its expiration date.

A person can file a termination statement stating a lien has been terminated, but the original UCC-1 is still retained on record. A UCC-3 is an amendment document that can be used to continue the lien for an additional five years, to file a termination statement, to file an assignment, or to file a change in collateral. A UCC-5 is a correction statement filed by a person who believes the record is either in error or false.

Vasquez verified that six UCC filings had been filed in her office which listed Gruber as the secured party and Bachhofer, Barron, Luke & Barron, and Luke as debtors.[7] She also verified five other UCC-1s listing Labelle as the secured party and Cleek, Barron, Luke, and Luke & Barron as debtors. Vasquez confirmed her office is a government office and the UCC-1s are government documents.

The trial court took judicial notice, in the jury's presence, that the First House of Delegates, District Court, 13th Judicial District, California was not a court recognized

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[7] The documents which Gruber filed and which listed Gruber as creditor are: (1) a UCC-1 numbered 0303160513, filed January 30, 2003, listing Bachhofer as debtor and the judgment in case #990629-2 as collateral; (2) a UCC Financing Statement Amendment numbered 03316C0404, filed November 6, 2003, which restated the collateral on UCC-1 number 0303160513 as the property description of three parcels; (3) a UCC-1 numbered 0331660890, filed November 6, 2003, listing Barron as debtor and "Notice of Apparent Liability default judgment" for $10,000, as collateral; (4) a UCC-1 numbered 0331660884, filed November 6, 2003, listing Barron as debtor, and "[a]ll of debtor's assets, land, and personal property, and all of debtor's interest in said assets, land, and personal property, now owned and hereafter acquired, now existing and hereafter arising, and wherever located, in the amount of two million United States Dollars ($2,000,000.00); (5) a UCC-1 numbered 0333760939, filed November 25, 2003, listing "Luke & Barron" as debtor and "[a]ll of debtor's assets, land, bonds, and personal property, and all of debtor's interest in said assets, land, and personal property, now owned and hereafter acquired, now existing and hereafter arising, and wherever located[,]" as collateral; and (6) a UCC-1 numbered 0333760936, filed November 25, 2003, listing Luke as debtor and "[a]ll of debtor's assets, land, bonds, and personal property, and all of debtor's interest in said assets, land, and personal property, now owned and hereafter acquired, now existing and hereafter arising, and wherever located[,]" as collateral.

under the laws of the State of California or Tulare County. The trial court also informed the jury that a name cannot be copyrighted.

Defense Case

Gruber did not testify at trial or present any evidence. Labelle testified that he knew Gruber as an acquaintance and they "got in touch" every once in awhile. Labelle never went to political meetings with Gruber, nor did he know of Gruber's association with any political group. Labelle denied being a member of any anarchist group trying to overthrow the government or harass the government with paper. Labelle admitted serving papers for Gruber three or four times, including the papers regarding Crane's Towing, but claimed he did not read the documents or know their contents. When he signed the documents, it was just to certify that he had served them. Gruber did not pay Labelle for serving the documents. Labelle denied being associated with the 13th District Court or participating with Gruber in any action regarding the 13th District Court.

Labelle became aware his name had come up in a civil lawsuit involving the law firm of Luke & Barron when Gruber called him. Labelle never saw a publication regarding the lawsuit in the newspapers because he did not read them. Labelle contacted the court, which informed him that process servers were not sued. Labelle said someone named Carrie Lawrence pulled the file and could only find Labelle's proof of service. Labelle admitted responding to the lawsuit in the same manner as Gruber, using a copy of Gruber's response as a guide. He prepared the document at home and delivered it to Gruber. The documents were sent to Luke & Barron and the court. Labelle believed this was a legitimate way to respond to the lawsuit. When Labelle was asked why both he and Gruber had prepared documents in red ink, he responded that he had red pens around the house. He denied that he and Gruber prepared the documents together.

Labelle said he did not seek legal counsel because he could not afford any. Although he called the legal aid office once, it was very difficult to get help. Labelle came to the court several times to review the file of the lawsuit, only to have Carrie

Lawrence tell him the file was on Cleek's desk. Labelle claimed he told Lawrence he had a copyright on his name.

Labelle published his copyright claim on his name in 2000 or 2001. Gruber also had a copyright on his own name. Labelle copied the language in the claim from several sources, including something he saw in the newspaper, from Gruber, and from a book. At that time, he believed he had a legitimate claim to use of his name. Labelle contacted several attorneys, but he could not speak to them because they required a deposit.

Labelle called the Secretary of State's office three times to determine how to file a UCC-1 form. Labelle was informed that the office did not care about the form's content. Labelle said he told the person he spoke to what he wanted to do and was told there was nothing wrong with that. Labelle claimed before he called the Secretary of State's office, he had hand-delivered notices to Luke & Barron, Barron, Luke and Cleek about his rights to the use of his name, which notified them they would owe him money if they used his name. Labelle never received a response from any of these people. Labelle denied that he was conspiring with Gruber with respect to the UCC forms and stated he was acting on his own. Labelle denied misleading anyone in order to get the form. When asked how he knew about the UCC forms, Labelle testified he had seen one before, but he didn't know where or remember how he obtained the form.

Labelle prepared and filed UCC-1s against Cleek, Barron and Luke, all of whom he believed had a legitimate debt to him because they used the copyright after getting his notice to cease doing so. Labelle denied consulting Gruber about the filing of the UCC-1s and did not recall informing Gruber he was preparing them. Labelle never tried to enforce these debts. Labelle did not believe the UCC-1s represented fraudulent debts. Until he was sued, he did not know the effect the UCC-1 had on the tow truck driver's efforts to sell his property. There were no UCC-1s filed showing he and Gruber to be joint creditors against anyone.

Labelle did not remember refusing to identify himself to Grant or talking to Grant about the California Constitution. Labelle had not read either of the state constitutions. Grant never told Labelle the UCCs were incorrect; he first found out they were invalid after charges were filed against him and he hired defense counsel.

Labelle attempted to correct the UCC-1s that he filed by mailing corrections on October 12, 2004. The Secretary of State received them on October 18, 2004, three days after the preliminary hearing. Labelle claimed he didn't terminate the liens earlier because he didn't know how. The first termination statements (UCC-3s) he filed were returned because he had changed his address and the officer would not accept two changes on the same form, namely the address change and the termination. Labelle sent out corrected forms and, as of trial, had not received back the filed versions.

DISCUSSION

A. *Section 115: Offering a False Instrument for Filing in a Public Office*

Gruber contends there was insufficient evidence to support his convictions for violating section 115. Specifically, Gruber argues the evidence is insufficient to show (1) the UCC-1 financing statements were instruments within the meaning of section 115, (2) the statements were false, and (3) Gruber knew the statements were false when filed.

Standard of Review

"In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Bolin* (1998) 18 Cal.4th 297, 331, citing *Jackson v. Virginia* (1979) 443 U.S. 307, 319-320; *People v. Johnson* (1980) 26 Cal. 3d 557, 578.) "Reversal on this ground is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction]'" (*People v. Bolin, supra,* 18 Cal.4th at p. 331, citing *People v. Redmond* (1969) 71 Cal. 2d 745, 755) even if "the conviction rests primarily on circumstantial

evidence" (*People v. Kraft* (2000) 23 Cal.4th 978, 1053) that is reasonably susceptible to a different finding (*People v. Escobar* (1992) 3 Cal.4th 740, 750).

Whether the UCC-1s Were Instruments

Section 115, subdivision (a) provides: "Every person who knowingly procures or offers any false or forged instrument to be filed, registered, or recorded in any public office within this state, which instrument, if genuine, might be filed, registered, or recorded under any law of this state or of the United States, is guilty of a felony." A Form UCC-1 Financing Statement (UCC-1) is filed with the California Secretary of State's office. (Cal. U. Com. Code, § 9501.) The parties do not dispute that the Secretary of State's office is a public office.

Section 115 "punishes offering a false instrument for filing." (*People v. Tate* (1997) 55 Cal.App.4th 663, 664; see also *People v. Gangemi* (1993) 13 Cal.App.4th 1790, 1795.) "'The core purpose of Penal Code section 115 is to protect the integrity and reliability of public records.' [Citations.] This purpose is served by an interpretation that prohibits any knowing falsification of public records." (*People v. Feinberg* (1997) 51 Cal.App.4th 1566, 1579.)

"Section 115, by its terms, limits prosecution for filing false or forged instruments to those instruments which, 'if genuine, might be filed, registered, or recorded' under state or federal law. Recording a false or forged instrument is not actionable under section 115 if the instrument was not legally entitled to be recorded. [Citation.]" (*People v. Powers* (2004) 117 Cal.App.4th 291, 295 (*Powers*).) While Gruber contends the UCC-1s at issue were not legally entitled to be recorded because he used them to attempt to secure an alleged debt arising from tort, which he claims is excluded from coverage of the financing statement by Commercial Code section 9104, Gruber misunderstands this requirement. The test is whether a law authorizes the recording of the instrument, not whether there was a legal basis for recording the instrument. (*People v. Harrold* (1890) 84 Cal. 567, 569-570 [no law authorizes the recording of an assignment of interest in

letters of patent in the office of the county recorder, therefore section 115 is inapplicable since even if the instrument were genuine, it would not be entitled to be recorded under the law of the state].) This requirement is met here, where the law authorizes the filing of UCC-1s in the Secretary of State's office. (Cal. U. Com. Code, § 9501.)

The question presented here is whether a UCC-1 is an instrument within the meaning of section 115. The People argue the mere fact that a document is entitled to be filed, registered or recorded shows the document is of sufficient legal importance that it constitutes an instrument worthy of protection under section 115, and urge us to follow a case from the Arizona Supreme Court that so held, *Lewis v. State* (1927) 32 Ariz. 182 [256 P. 1048]. In that case, the Arizona Supreme Court, interpreting a provision identical to section 115, declined to limit the meaning of the term "instrument" to a particular class of documents because it concluded the statute was meant to prevent "the filing or recording of any false instrument no matter what its nature, if the instrument was of a character which the state considered important enough to make the instrument a public record." (*Lewis v. State, supra,* 256 P. at p. 1050.)

No California court, however, has adopted such a broad interpretation of the term "instrument." As the court noted in *Powers*, "California courts have shown reluctance to interpret section 115 so broadly that it encompasses any writing that may be filed in a public office." (*Powers, supra,* 117 Cal.App.4th at p. 295.) As the *Powers* court explained: "Early cases narrowly interpreted instrument under section 115 as 'an agreement expressed in writing, signed, and delivered by one person to another, transferring the title to or creating a lien on real property, or giving a right to a debt or duty.' (*People v. Fraser* (*Fraser*) (1913) 23 Cal.App. 82, 84-85 [holding that a birth certificate is not an instrument under § 115].) [¶] The *Fraser* court's narrow definition was imported from the recording act in the Civil Code, where title to real property is subjugated to the interests of a good faith purchaser for value who acquires title or a lien by an '"instrument that is first duly recorded."' (*Foorman v. Wallace* (1888) 75 Cal. 552,

555-556; *Hoag v. Howard* (1880) 55 Cal. 564, 565-666; Civil Code, § 1107.) Under these real property cases, a sheriff's certificate of sale was held to be an instrument, whereas a writ of attachment was not, because only the former document creates or conveys title. (*Foorman v. Wallace*, *supra*, at pp. 556-557; *Hoag v. Howard*, *supra*, at pp. 565-566.) As used in the recording act affecting title to real property, the word instrument invariably indicated a written paper 'signed and delivered by one person to another, transferring the title to or creating a lien on property, or giving a right to a debt or duty.' (*Hoag v. Howard*, *supra*, at p. 565.)" (*Powers*, *supra*, 117 Cal.App.4th at pp. 295-296.)

The *Powers* court, noting that "the *Fraser* court's reliance on real property cases overlooked the broader contemporaneous meaning of the word instrument[,]" pointed out that more recent cases "have rightly criticized *Fraser*'s narrow reading of instrument drawn exclusively from civil cases concerning real property. [Citations.]" (*Powers*, *supra*, 117 Cal.App.4th at p. 296; see *People v. Tate, supra,* 55 Cal.App.4th at p. 667 [declining to follow *Fraser* in determining that community work referral forms falsified to show completion of a condition of probation were instruments within the meaning of section 115]; *People v. Parks* (1992) 7 Cal.App.4th 883, 887 [rejecting the *Fraser* line of decisions in concluding a temporary restraining order falsified to expand its requirements is an instrument within the meaning of section 115, concluding "[w]hatever else may be meant by the word 'instrument,' on these facts we find that protection of judicial and public records such as the documents in this case was clearly within the legislative intent of section 115."]; *Generes v. Justice Court* (1980) 106 Cal.App.3d 678, 682-684 [rejecting *Fraser* in concluding deed from and to the defendant which purported to convey an easement is an instrument within the meaning of section 115, holding that "to qualify as an instrument within [section 115], a document need not represent an agreement; moreover it is not necessary that such a document be one that requires a delivery as a condition of validity."].)

Recognizing that "the Legislative purpose of section 115 is to safeguard the integrity of official records" and "[n]othing in the statute suggests that real property records alone are worthy of protection[,]" the court in *Powers* also declined to follow *Fraser* and its progeny in determining whether fishing activity records filed with the California Department of Fish and Game were instruments within the meaning of section 115. (*Powers, supra*, 117 Cal.App.4th at p. 296 ["… more recent authority has demonstrated that the limited definition of instrument articulated in *Fraser* is incorrect and should not be perpetuated."].) As no case which had rejected *Fraser* established a test for determining when a particular document is an "instrument" within the meaning of section 115, the *Powers* court looked to a decision from the Washington Supreme Court, *State v. Price* (1980) 94 Wash.2d 810 [620 P.2d 994] (*Price*), which held that fishing receiving tickets used to record fishing information were instruments under a Washington criminal provision virtually identical to section 115. (*Powers*, *supra*, 117 Cal.App.4th at p. 297.)

In *Price*, the court determined that a document required or permitted to be filed, registered, or recorded in a public office is an instrument if "(1) the claimed falsity relates to a material fact represented in the instrument; and (2a) the information contained in the document is of such a nature that the government is required or permitted by law, statute or valid regulation to act in reliance thereon; or (2b) the information contained in the document materially affects significant rights or duties of third persons, when this effect is reasonably contemplated by the express or implied intent of the statute or valid regulation which requires the filing, registration, or recording of the document." (*Price, supra*, 620 P.2d at p. 999.) Applying that test to the fishing activity records in *Powers*, the *Powers* court concluded the records were instruments within the meaning of section 115 because the Department of Fish and Game relied on the records to set fishing limits, which materially affect commercial fishing enterprises and recreational anglers, and the

management of fisheries demanded accurate information. (*Powers*, *supra*, 117 Cal.App.4th at p. 297.)

Here, the UCC-1 financing statements Gruber filed provide a limited amount of information indicating a person may have a security interest in the collateral listed on the statement. (Cal. U. Com. Code, § 9502, com. 2.) While the debtor's signature on the statement is not required, an initial or amended financing statement can be filed only if the debtor has authorized the filing in either an authenticated record or a security agreement, or by acquiring collateral in which a security interest continues. (Cal. U. Com. Code, § 9509, subds. (a), (b) & (c).) Filing a financing statement is usually necessary to perfect a security interest. (Cal. U. Com. Code, § 9310, subd. (a).) Once a security interest is perfected, "the secured party is protected against creditors and transferees of the debtor and, in particular, against any representative of creditors in insolvency proceedings instituted by or against the debtor." (Cal. U. Com. Code, § 9308, com. 2.)

Applying the test set forth in *Powers* and *Price*, the UCC-1s Gruber filed were false in a material fact represented in them as, contrary to the representations in the statements, Gruber had no security interest in any property of the "debtors" listed as collateral and none of the "debtors" had authorized the filing of the statements. As the People point out, the information contained in the UCC-1s materially affects the significant rights of third persons since they create priorities in the collateral listed in the statements as against creditors and transferees who come after perfection of the security interest. Moreover, the statements can materially alter the rights of a purported debtor as a practical matter by making it more difficult to freely sell to other parties the property subject to the financing statement, as graphically illustrated in Bachhofer's case. For these reasons, we find that the UCC-1 financing statements are instruments within the meaning of section 115.

Gruber argues that a portion of the test set forth in *Fraser*, namely that the document must give a right to a debt or duty, is still valid in determining whether the UCC-1s are instruments. Gruber reasons that because the UCC-1s do not give a right to a debt or duty, they cannot be instruments under section 115. We disagree that this remains the test for determining whether a particular document is an "instrument." As the court stated in *Powers*, "[w]hile instrument under section 115 was narrowly construed in early cases to apply mostly to real property documents, the statute has been broadly construed for decades to cover a wider array of documents. (*People v. Tate*, *supra*, 55 Cal.App.4th at p. 667 [work referral form]; *People v. Parks*, *supra*, 7 Cal.App.4th at pp. 885, 887 [temporary restraining order].) As observed in *Tate*, the *Fraser* line of precedent narrowly construing instrument under section 115 came to an end with *Generes* in 1980. (*People v. Tate*, *supra*, at p. 666, citing *Generes v. Justice Court*, *supra*, 106 Cal.App.3d at p. 682.)" (*Powers*, *supra*, 117 Cal.App.4th at p. 298.)[8]

Falsity and Knowledge of Falsity

Gruber next argues there was insufficient evidence the UCC-1s filed were false or that he knew they were false when filed. Gruber claims the UCC-1s were not false because they "were efforts to memorialize defendant/appellant Gruber's claim against the individuals involved based upon his assertion of tort liabilities[,]" and Gruber did not know they were false because he obtained a "judgment" in a court he believed was a legitimate court and he believed he had a right to file the UCC-1s.

A violation of section 115 "is sufficiently proven when it is shown that the accused intentionally committed the forbidden act." (*People v. Geibel* (1949) 93

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[8] The case Gruber relies on, *People v. Soriano* (1992) 4 Cal.App.4th 781, does not compel a different result. In that case, the parties agreed that a death certificate was not an instrument within the meaning of section 115, based on the definition of instrument as being "a writing which transfers title to or creates a lien on real property, or gives a right to a debt or duty." (*Id.* at p. 783.) The court did not reach the issue, therefore, of whether that definition remained viable.

Cal.App.2d 147, 168-169.) "The required mental state is 'knowingly.'" (*People v. Gutierrez* (1997) 52 Cal.App.4th 380, 385.) "To act 'knowingly' means only that the actor must know of the existence of the facts which constitute the offense. Thus, '[k]knowledge does not refer to the defendant's awareness that what he or she does is culpable or criminal in nature. Knowledge refers to awareness of the particular facts proscribed in criminal statutes.' [Citation.]" (*People v. Honig* (1996) 48 Cal.App.4th 289, 336-337; see also *People v. Ramsey* (2000) 79 Cal.App.4th 621, 632.) "'"A requirement of knowledge is not a requirement that the act be done with any specific intent.… The word 'knowing' as used in a criminal statute imports only an awareness of the facts which bring the proscribed act within the terms of the statute. [Citation.]"' [Citations.]" (*People v. McDaniel* (1994) 22 Cal.App.4th 278, 285; see also *People v. Hawkins* (2002) 98 Cal.App.4th 1428, 1438-1439; *In re Ramon A.* (1995) 40 Cal.App.4th 935, 938; *People v. Horowitz* (1945) 70 Cal.App.2d 675, 702.)

For purposes of section 115, a defendant "who does not know" that he or she has offered a false document to be filed has not committed a violation of the statute. (See *People v. Rubalcava* (2000) 23 Cal.4th 322, 332; *People v. Taylor* (2001) 93 Cal.App.4th 933, 941; *People v. Gaitan* (2001) 92 Cal.App.4th 540, 547.) The statute does not sanction a defendant who acts "recklessly;" the defendant must act with actual knowledge of the false or forged nature of the instrument filed. (See *People v. Stanistreet* (2002) 29 Cal.4th 497, 506; *People v. Garcia* (2001) 25 Cal.4th 744, 752-753.) Thus, the evidence must prove Gruber knew the existence of facts that established the invalidity of the UCC-1s, i.e. that he did not have a security interest in the collateral listed or a legitimate judgment against the named debtors, and made a false statement in the UCC-1s.

Contrary to Gruber's arguments, there is sufficient evidence to support the jury's findings that the financing statements were false and Gruber knew they were false. As explained above, the jury reasonably could conclude the financing statements were false

because Gruber had no security interest in any property of the "debtors" listed as collateral and none of the "debtors" had authorized the filing of the statements. In addition, the financing statements were false because they were not based on any legitimate judgment or debt, as they were based on judgments from a fictitious court.

The jury also reasonably could conclude Gruber knew the financing statements were false. The jury reasonably could infer Gruber was aware that courts lawfully existed in California which would not recognize the purported judgments he obtained in the Thirteenth Judicial District, as a police officer stopped the vehicle he was driving, cited him for failing to have valid California registration and impounded the car, which Crane's Towing refused to return to him without a release from the police department. Since the UCC-1s were based on judgments from a fictitious court which Gruber knew was not a recognized court, the jury reasonably could find Gruber also knew the UCC-1s falsely represented that any of the debtors listed on the statements owed him a genuine debt or that he had a security interest in any of the collateral listed on the statements.

Moreover, the jury reasonably could infer Gruber did not actually believe he was entitled to the damages he claimed he was owed, as there is no evidence Gruber had even an arguable claim against any of the purported debtors or was entitled to the significant amount of damages claimed. As the People point out, the purported debtors had a tenuous connection to any alleged wrongdoing against Gruber – Bachhofer merely towed the vehicles on orders of the police officers involved (apparently without damaging the vehicles) and impounded the vehicles, Barron and his law firm were merely Bachhofer's attorney in the lawsuit brought against Gruber and Labelle, and Luke's and Cleek's only connection to Gruber was the fact their names appeared on court documents. Despite the lack of evidence of wrongdoing against Gruber, Gruber claimed he sustained $800,000 in damages due to Bachhofer's actions, $2,000,000 and $10,000 in damages due to Barron's actions, and he had a security interest in all of the property owned by Luke and her law firm. Despite these large sums, there is no evidence Gruber attempted to collect the

purported debts memorialized in the financing statements other than by filing the UCC-1s; Labelle testified he never attempted to enforce the debts he claimed he was owed.

Gruber argues, citing jury instruction CALJIC No. 2.02 on circumstantial evidence, that if circumstantial evidence regarding his knowledge of the financing statement's falsity reasonably may be interpreted as showing either innocence or guilt, we should accept the interpretation pointing toward innocence. Specifically, Gruber argues that because there was direct evidence he believed he had the right to file the financing statements, the circumstantial evidence "was manifestly reconcilable with innocence" and his conviction is not supported by substantial evidence. In making this argument, Gruber ignores the rule that "[a]lthough it is the [trier of fact's] duty to acquit a defendant if it finds the circumstantial evidence susceptible of two reasonable interpretations, one of which suggests guilt and the other innocence, it is the [trier of fact], not the appellate court that must be convinced of the defendant's guilt beyond a reasonable doubt. [Citation.] '"If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment. [Citation.]"' [Citation.]" (*People v. Kraft, supra,* 23 Cal.4th at pp. 1053-1054.) As we have concluded that, in the context of this case, the jury reasonably could find Gruber knew the financing statements were false, his argument fails.

B. The Conspiracy Counts

Gruber contends his convictions on the conspiracy counts must be reversed because the court erred when it failed to instruct the jury, sua sponte, on the elements of the target offenses on each of the conspiracy counts. Gruber further contends reversal is required because the evidence is insufficient to show he intended to enter into an agreement to defraud anyone or to use documents resembling process of court.

A conspiracy exists when one or more persons have the specific intent to agree to conspire to commit an offense, as well as the specific intent to commit the elements of

that offense, together with proof of the commission of an overt act by one or more of the parties to such agreement in furtherance of the conspiracy. (§§ 182, 184; *People v. Morante* (1999) 20 Cal.4th 403, 416; *People v. Swain* (1996) 12 Cal.4th 593, 599-600; *People v. Belmontes* (1988) 45 Cal.3d 744, 789.) These facts may be established through the use of circumstantial evidence. (*People v. Longines* (1995) 34 Cal.App.4th 621, 626; *People v. Towery* (1985) 174 Cal.App.3d 1114, 1131-1132.) They may also be "'inferred from the conduct, relationship, interests, and activities of the alleged conspirators before and during the alleged conspiracy. [Citations.]'" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1135, quoting *People v. Cooks* (1983) 141 Cal.App.3d 224, 311.)

Conspiracy, therefore, is a two-part specific-intent crime: "'(a) the intent to agree, or conspire, and (b) the intent to commit the offense which is the object of the conspiracy.'" (*People v. Swain, supra*, 12 Cal.4th at p. 600.) "'To sustain a conviction for conspiracy to commit a particular offense, the prosecution must show not only that the conspirators intended to agree *but also that they intended to commit the elements of that offense*.'" (*Ibid.*) The trial court, however failed to instruct on these two parts of the crime. Instead, the trial court orally instructed the jury as follows: "A conspiracy as charged in this Information is an agreement entered into between two or more persons with the specific intent, so there is a specific intent requirement as to the conspiracy count, but not as to the other counts, a specific intent to agree to commit a crime followed by an overt act committed in this state by one or more of the parties for the purposes of accomplishing the object of the agreement." As the People recognize, the trial court's instruction conflated the two different kinds of intent, effectively removing the element of conspiracy that the defendant specifically intend to commit the crime that is the target of the conspiracy.

In addition, the trial court did not instruct on the elements of the target offenses of the conspiracy: defrauding another of property (count 12) and use of documents

resembling process of the court (count 13). As Gruber contends, and the People concede, the elements of defrauding another of property are (1) the defendant's making of a false pretense or representation, (2) the intent to defraud the owner of his property, and (3) the owner's actual reliance on the false pretense in parting with his property. (*People v. Fujita* (1974) 43 Cal.App.3d 454, 467.) The crime of using court documents resembling court order or process is defined in section 526 as follows: "Any person, who, with intent to obtain from another person any money, article of personal property or other thing of value, delivers or causes to be delivered to the other person any paper, document or written, typed or printed form purporting to be an order or other process of a court, or designed or calculated by its writing, typing or printing, or the arrangement thereof, to cause or lead the other person to believe it to be an order or other process of a court, when in fact such paper, document or written, typed or printed form is not an order or process of a court, is guilty of a misdemeanor, and each separate delivery of any paper, document or written, typed or printed form shall constitute a separate offense." Based on the statute, the crime consists of the following elements: (1) delivering or causing to be delivered to another person; (2) with intent to obtain from that person anything of value; (3) any paper, document or form purporting to be an order or process of a court, or designed or calculated to cause or lead that person to believe it to be an order or other process of a court; (4) when the paper, document or form is not an order or process of a court. (§ 526.) Notably, both crimes require an intent to defraud or an intent to obtain from another person a thing of value.

The People concede the trial court erred when it failed to instruct the jury on the elements of these offenses. As the parties recognize, the failure to instruct the jury on an element of the offense is subject to harmless error analysis under *Chapman v. California* (1967) 386 U.S. 18, 24. Under that test, we must determine whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict. (*People v. Magee* (2003) 107 Cal.App.4th 188, 194.) To say an error did not contribute to the

verdict is to find the error unimportant in relation to everything else the jury considered on the issue in question. The evidence must be of such compelling force as to show beyond a reasonable doubt that the erroneous instruction must have made no difference in reaching the verdict obtained. (*People v. Chavez* (2004) 118 Cal.App.4th 379, 387.)

The People contend the error is harmless beyond a reasonable doubt because the jury necessarily resolved the factual questions posed by the omitted instructions adversely to Gruber under other, properly given instructions, and no rational jury could have found these missing elements unproven, citing *People v. Ortiz* (2002) 101 Cal.App.4th 410 and *People v. Avila* (1995) 35 Cal.App.4th 642. The People reason that because the jury found Gruber had the specific intent to enter into the agreements to defraud Bachhofer of property and use documents resembling process of the court when it convicted him of conspiracy on counts 12 and 13, and found Gruber committed three overt acts in furtherance of the conspiracy, namely that he (1) obtained a fraudulent UCC-1, (2) obtained a fraudulent "claim from the thirteenth judicial district court" signed by Christopher James as clerk, and (3) presented a fraudulent UCC-1 to the California Secretary of State for filing, no jury could have found Gruber did not have the specific intent to complete the target crimes, namely the intent to defraud the purported debtors or to take something of value from them.

The People essentially argue that because the jury was instructed it had to find Gruber had the specific intent to agree to commit a crime, which the verdict form identified as defrauding another of property and use of documents resembling process of court, and the jury found Gruber guilty on both conspiracy counts, the jury necessarily found Gruber had the specific intent to defraud, which is a required element in both of the target offenses. We do not agree for the simple reason that the jury was never given the

definition of intent to defraud.[9] As Gruber points out, this convoluted reasoning amounts to bootstrapping. To conclude the jury necessarily found Gruber had the specific intent to defraud because it found an agreement to defraud without being instructed on what it means to have that intent would require us to engage in pure speculation, particularly in light of the evidence in this case. While there is certainly evidence from which a rational trier of fact could find intent to defraud based on the facts that Gruber filed the financing statements and he provided notice of Bachhofer's financing statement to the escrow company after learning Bachhofer intended to sell the business, a rational trier of fact could just as easily find Gruber had some other intent behind the scheme, such as harassment of his victims, particularly in light of the fact he never made any other efforts to collect any of the purported judgments.

Although the evidence is sufficient to support the findings required to convict Gruber of the conspiracy counts, since a rational jury could have found Gruber did not have the intent to commit the underlying crimes, we cannot find the instructional error harmless beyond a reasonable doubt. Accordingly, we reverse Gruber's convictions on counts 12 and 13 for conspiracy to defraud and conspiracy to use documents resembling process of the courts.

DISPOSITION

The judgment is affirmed except for the conviction as to the count 12 conspiracy to defraud and count 13 conspiracy to use documents resembling process of the courts, which is reversed. The matter is remanded to the superior court. If within 30 days after

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[9] This error was compounded when the prosecutor argued to the jury during closing argument that the jury did not have to find fraudulent intent: "There is no fraudulent intent. I noticed he made the statement, I got to show fraudulent intent. You don't have to show any intent. The only intent is to conspire to get together. They got together and talked about this. That's conspiring. And if they acted on that, that's the act [in] furtherance of that conspiracy, and the act is the filing of the UCC documents."

the filing of the remittitur in the superior court the prosecutor files a written election to try Gruber before a properly instructed jury, and brings him to trial within 60 days after the remittitur filing, the superior court shall proceed accordingly. (See Pen. Code, § 1382, subd. (a)(2).) Otherwise the superior court shall dismiss the count 12 conviction of conspiracy to defraud and count 13 conviction of conspiracy to use documents resembling process of the courts, issue an amended abstract of judgment, and forward certified copies of the amended abstract of judgment to the appropriate persons. Gruber has no right to be present at proceedings modifying the judgment and amending the abstract of judgment. (See *People v. Price* (1991) 1 Cal.4th 324, 407-408.)

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Gomes, J.

WE CONCUR:

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Vartabedian, Acting P.J.

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Hill, J.